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No. 07-948

In The

Supreme Court of the United States

NATIONAL CASUALTY COMPANY,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition involves an action in admiralty for a declaratory judgment to determine the existence or scope of coverage under a policy of marine insurance. The insurer filed a complaint in district court and elected to proceed in admiralty without a jury under Rule 9(h) of the Federal Rules of Civil Procedure. The defendant policyholder filed a counterclaim and demanded a jury trial. The district court struck the jury demand, but the Fourth Circuit granted the defendant's petition for a writ of mandamus and directed the district court on remand to try the case before a jury.

Accordingly, the question presented in this Petition is:

When a plaintiff elects, pursuant to Federal Rule of Civil Procedure 9(h), to proceed in admiralty without a jury on a claim that could also have been brought at law, can the defendant nullify that election and impose a jury trial?

PARTIES TO THE PROCEEDING

The petitioner is National Casualty Company, which was the respondent in the case before the United States Court of Appeals for the Fourth Circuit.

The respondent is Lockheed Martin Corporation, which was the petitioner in the case below.

RULE 29.6 DISCLOSURE

All of the stock of National Casualty Company is owned by Nationwide Mutual Insurance Company, which is not a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

National Casualty Company ("National Casualty") petitions for a Writ of Certiorari to review the Opinion and Judgment issued by the United States Court of Appeals for the Fourth Circuit granting the Petition for Writ of Mandamus of Lockheed Martin Corporation ("Lockheed Martin") and directing the United States District Court for the District of Maryland to try this case before a jury.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 415 F.Supp.2d 596 (D. Md. 2006) and is reprinted in the Appendix at 21a. The opinion of the United States Court of Appeals for the Fourth Circuit issued on September 27, 2007 is reported at 503 F.3d 351 (4th Cir. 2007) and is reprinted in the Appendix at 1a. The Order of the United States Court of Appeals for the Fourth Circuit issued on October 23, 2007 denying Petitioner's Petition for Rehearing and Rehearing En Banc is not reported but is reprinted in the Appendix at 42a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its Opinion and Judgment granting a writ of mandamus on September 27, 2007, and entered its Order denying rehearing and rehearing en banc on October 23, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. VII.

Section 9 of the Judiciary Act of 1789, which was enacted on September 24, 1789, the day before the Seventh Amendment was proposed by Congress, provided:

> *That the district courts* shall have, exclusive of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and *shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction*, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from

> the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) *saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it*; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. (b) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. (c) And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. (d) *And the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.*

Judiciary Act, ch. XX, § 9, 1 Stat. 73, 76-77 (1789) (emphasis added). This provision now is codified at 28 U.S.C. § 1333(1), which reads:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333(1).

Rule 9(h) of the Federal Rules of Civil Procedure states:

> **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Rule 9(h), Federal Rules of Civil Procedure (2005).

Rule 38(e) of the Federal Rules of Civil Procedure states:

> **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to

> trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 38(e), Federal Rules of Civil Procedure (2005).

INTRODUCTION

This marine insurance coverage dispute raises a pure legal question of admiralty jurisdiction that arises frequently and as to which the circuits are in conflict.

Since 1789, it has been a fundamental principle of admiralty law that, upon the election by a plaintiff to invoke admiralty jurisdiction and its procedures, admiralty and maritime claims will be tried to the court, without a jury. This uniform practice was preserved and continued when the Admiralty Rules were unified with the Federal Rules of Civil Procedure in 1966 by the adoption of Rules 9(h) and 38(e). Pursuant to Rule 9(h), a plaintiff has the right to designate its claim "as an admiralty and maritime claim for the purposes of Rule[] ... 38(e) ... ." The adoption of Rules 9(h) and 38(e) was a recognition that when, prior to 1966, a plaintiff chose to file a claim as to which there was jurisdiction in admiralty and some other basis for federal jurisdiction, the plaintiff had the right to file on the admiralty "side" of federal court. The consequence of this choice was that a jury trial would not be available to either the plaintiff or the defendant, unless Congress had expressly provided otherwise. Rules 9(h) and 38(e) explicitly preserved that practice.

The Fourth Circuit's decision in this case nullifies this choice and allows a defendant to force a jury trial in spite of the admiralty plaintiff's election otherwise. The court below follows decisions of the Eighth and Ninth Circuits in direct conflict with the Fifth Circuit's decision in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). In so doing, the Fourth Circuit's holding cannot be squared with this Court's decision in *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), which held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause.

The issue is one of recurring importance in the federal courts, as evidenced by the vast majority of numerous district court decisions that side with the Fifth Circuit's authoritative *Harrison* opinion. And this petition raises an optimal vehicle for this Court's resolution of the conflict, because it arises out of a petition for a writ of mandamus by the Fourth Circuit on purely legal grounds; it thus raises a pure question of law without any jurisdictional, factual, or other issues that might impede the Court's resolution of the conflict. This Court's review is therefore warranted.

STATEMENT OF THE CASE

In July 2001, a vessel owned by Lockheed Martin, the M/V SEA SLICE, sustained extensive damage to its hull and machinery in normal seas on the Pacific Ocean approximately 130 miles from Honolulu, Hawaii en route to Anchorage, Alaska. National Casualty conducted its investigation to determine whether

coverage existed and the extent of any covered damage to the vessel. With uncertainty because of incomplete information, National Casualty found probable coverage and in July 2003 adjusted the claim and paid the reasonable cost of repairs as required by the policy. Lockheed Martin objected to the amount of the adjustment and performed its own analysis, making demand for additional payment in May 2005. The parties were thereafter unable to agree on the extent of any covered loss.

To expedite resolution of the dispute, on July 22, 2005, National Casualty filed a complaint for declaratory judgment in the United States District Court for the District of Maryland. The complaint alleged that the district court had jurisdiction over the case under both 28 U.S.C. § 1332, as a civil action between citizens of different states, and 28 U.S.C. § 1333, as an admiralty or maritime action. In the complaint, National Casualty notified the district court and Lockheed Martin that it "elects to bring this action as an admiralty or maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure." After National Casualty filed an amended complaint, in which it again invoked Rule 9(h), Lockheed Martin filed an answer in which it admitted that "diversity jurisdiction and admiralty and maritime jurisdiction exist." It also filed a counterclaim demanding a trial by jury.

National Casualty filed a motion to strike Lockheed Martin's demand for jury trial, and on February 17, 2006, the district court granted National Casualty's motion. App. 21a, 41a; *National Casualty Co. v. Lockheed Martin Corp.*, 415 F.Supp.2d 596 (D. Md.

2006). In so ruling, the court noted that the majority of courts addressing the question since 1959 had concluded that "an admiralty plaintiff's right to a bench trial 'trumps' the defendant's right to a jury trial of its counterclaim." App. 36a.

Lockheed Martin thereupon filed a petition for writ of mandamus with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit granted the petition for writ of mandamus and directed "the district court on remand to try the case before a jury." App. 1a, 19a; *In re Lockheed Martin Corp.*, 503 F.3d 351, 360 (4th Cir. 2007). In reaching that conclusion, however, the Fourth Circuit recognized that the Seventh Amendment "applies only to cases *at law*, a category that does not include *maritime* cases," and that "the Seventh Amendment creates no constitutional right to a jury trial of maritime claims." App. 5a (citing *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847) and *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963)) (emphasis by the court). The Fourth Circuit further acknowledged that, "if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving to suitors clause does not permit a defendant to trump that designation and demand a jury trial" (citing *Waring* at 461) and that "this principle governs simple proceedings—*e.g.*, proceedings where the defendant does not assert any counterclaims or implead third parties ... ." App. 12a.

The Fourth Circuit thus acknowledged that, when a plaintiff designates its claim as a Rule 9(h) maritime claim, the Seventh Amendment is not implicated, and this designation precludes the defendant from obtaining a jury trial when it does not assert any

counterclaims. Nevertheless, the Fourth Circuit proceeded to conclude precisely the opposite: Lockheed Martin was entitled to a jury trial, "even if no counterclaims had been filed." App. 15a.

On October 23, 2007, National Casualty's petition for rehearing en banc or for panel rehearing was denied. App. 42a.

REASONS FOR GRANTING THE PETITION

I. A WELL-DEVELOPED CIRCUIT CONFLICT EXISTS ON WHETHER A PLAINTIFF'S ELECTION OF AN ADMIRALTY BENCH TRIAL CAN BE NEGATED BY A DEFENDANT'S REQUEST FOR A JURY TRIAL

A. Petitioner Would Prevail In The Fifth Circuit, Which Holds That A Plaintiff's Admiralty Demand For A Bench Trial Overcomes A Subsequent Request For A Jury Trial By Another Party

The Fourth Circuit below acknowledged that the courts are split on the central issue in this case – whether a defendant may override a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury. *See* App. 12a-14a. Indeed, the Fourth Circuit's decision in this case directly conflicts with the decision of the Fifth Circuit in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). In *Harrison*, a longshoreman was injured aboard a freighter by exposure to ruptured barrels of a hazardous chemical, and he sued the vessel owner,

designating the action as being within the admiralty jurisdiction of the court under Rule 9(h). The defendant vessel owner then impleaded the plaintiff's stevedore employer, who, in turn, filed a fourth-party complaint against the shipper of the chemical. The fourth-party defendant shipper demanded a jury trial, but the trial court denied the request. After a bench trial, the court entered judgment against the shipper, and the shipper appealed, arguing (among other things) that it had been deprived of its Seventh Amendment right to trial by jury. *Id.* at 985.

The Fifth Circuit rejected that argument and held that, "by electing to proceed under [Rule] 9(h) rather than by invoking diversity jurisdiction, the plaintiff may preclude the defendant from invoking the right to trial by jury which may otherwise exist." *Id.* at 986. As the *Harrison* court explained, allowing a party defendant to force a jury trial by the "simple expedient" of asserting an additional claim "based upon the same set of operative facts which gave rise to the first complaint" would "emasculate the election given to the plaintiff by Rule 9(h)." *Id.* at 987. *Harrison* thus properly recognizes that when the same transaction or occurrence gives rise to a controversy that includes opposing claims by two or more parties that could be brought either in admiralty or at law, the election to proceed with or without a jury rests with the plaintiff under Rule 9(h).

Applying the Fifth Circuit's rule to this case, petitioner would prevail. Under the holding in

Harrison, the Fifth Circuit[1] would give effect to petitioner's election to proceed in admiralty without a jury, notwithstanding respondent's attempts to nullify that choice by demanding a jury for adjudication of the same factual dispute.

B. The Eighth And Ninth Circuits Adhere To The Erroneous Fourth Circuit Rule Below

In addition to the Fourth Circuit below,[2] the Eighth and Ninth Circuits follow the erroneous rule that a defendant can negate a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury.

In *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1032 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992), the

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[1] The Fifth Circuit's preeminence as a maritime court has led the Ninth Circuit to describe it as the "cutwater" of maritime law. *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 673 (9th Cir. 1997), *cert. denied*, *Polaris Ins. Co. v. Aqua-Marine Constructors, Inc.*, 522 U.S. 933 (1997).

[2] The Fourth Circuit's own confusion on this issue is evidenced by its conflicting earlier decision, albeit arguably in dictum. *See Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933, 940 (4th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) ("Both the *Harrison* opinion and the Advisory Committee Note, however, make altogether clear that 'a simple statement in his (plaintiff's) pleadings to the effect that the claim is an admiralty or maritime claim' would serve the purpose of making the case a true one in admiralty, and thereby eliminate any possibility of trial by jury."). The decision below squarely places the Fourth Circuit in the same camp as the Eighth and Ninth Circuits.

plaintiff Connecticut Bank & Trust Company, as trustee for Wartsila Marine Industries, Inc., brought an *in rem* action to foreclose on a first preferred mortgage against the S/S MONTEREY ("vessel"). Wilmington Trust, as trustee for the International Organization of Masters, Mates, and Pilots ("Union"), although not named as a defendant in the original complaint, answered the complaint and filed an *in rem* claim against the vessel to foreclose its second preferred mortgage and also asserted counterclaims against Wartsila. Notwithstanding that the Union's claims arose from the same transactions as did the plaintiff's initial complaint, the Union demanded a jury trial on its claims, and as to each claim the Union alleged an independent ground (other than admiralty) for federal jurisdiction. The district court denied the Union's request for a jury trial, and the Union sought a writ of mandamus from the Ninth Circuit.

The Ninth Circuit concluded that the Union, as a defendant, enjoyed its own option under the "saving-to-suitors" clause, 28 U.S.C. § 1331(1), to identify its claims as proceeding either in admiralty or at law. 934 F.2d at 1032. The Ninth Circuit thus held that the plaintiff's "election to proceed in admiralty does not deprive the [defendant] of a jury trial on the [defendant]'s properly joined claims." *Id.* The Ninth Circuit recognized, however, that as a practical matter this "holding may result in the entire case being tried before a jury." *Id.* Thus, under the *Wilmington Trust* rule, if a plaintiff elects to proceed in admiralty but a defendant asserts claims that "are closely related factually" (*id.*) *and* demands a trial by jury, then plaintiff's Rule 9(h) election will be trumped and given no effect.

Similarly, in *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041-42 (8th Cir. 1983), the Eighth Circuit held that, even when a plaintiff has elected to proceed in admiralty without a jury pursuant to Rule 9(h), a defendant nonetheless has a right to demand a jury trial on a counterclaim that is within the court's civil jurisdiction. In *Koch Fuels*, the district court tried the plaintiff's admiralty claims without a jury, but granted the defendant's request for a separate jury trial of its counterclaim, notwithstanding that both plaintiff's and defendant's claims arose from the same "alleged agreement to charter a barge for transporting a shipment of oil." *Id.* at 1039. On appeal, the plaintiff argued that the entire case should have been tried without a jury, but the Eighth Circuit affirmed the district court's decision to sever the claims into separate trials. While the Eighth Circuit acknowledged that under traditional admiralty practice and Rule 9(h) the right to elect a jury trial belongs to the plaintiff (*id.* at 1041), the court nonetheless allowed the defendant a jury trial for its claim cognizable at common law, concluding that:

> Where, as here, both parties, using different triers of fact, could prevail on their respective claims without prejudicing the other party or arriving at inconsistent results, a trial judge may separate the claims in the interests of preserving constitutional rights, clarity, or judicial economy.

Id. at 1042. Thus, similar to *Wilmington Trust*, in *Koch Fuels* the defendant was allowed to trump the plaintiff's Rule 9(h) non-jury election and obtain a jury trial.

C. Contrary To The Fourth, Eighth And Ninth Circuits, The Overwhelming Majority Of District Courts Hold That A Defendant *Cannot* Override A Plaintiff's Election To Proceed In Admiralty Without A Jury

In addition to the conflicting decisions between courts of appeals on this issue, many district courts have also considered the issue raised here and have arrived at conflicting results. The overwhelming majority of district courts to consider the issue, however, have agreed with petitioner and the Fifth Circuit in *Harrison* – contrary to the holdings of the Fourth, Eighth and Ninth Circuits – that when a plaintiff elects to proceed in admiralty pursuant to Rule 9(h), and a defendant then files a counterclaim seeking the same relief on the basis of the saving-to-suitors clause and diversity jurisdiction, the defendant is not entitled to a jury trial for its counterclaim. *See, e.g., ING Groep, NV v. Stegall*, 2004 A.M.C. 2992, 2995-98 (D. Colo. 2004); *Windsor Mount Joy Ins. Co. v. Johnson*, 264 F.Supp.2d 158, 162-64 (D. N.J. 2003); *Jefferson Ins. Co. v. Maine Offshore Boats, Inc.*, 2001 A.M.C. 2171, 2172-74 (D. Me. 2001); *Clarendon Amer. Ins. Co. v. Rodriguez*, 1999 A.M.C. 2885, 2886-87 (D. P.R. 1999); *Underwriters at Lloyds, London v. Sundowner Offshore Services*, 1999 WL 90566, *1 (E.D. La. 1999); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair, Inc.*, 1996 WL 148350, *2 (S.D.N.Y. 1996); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552, 1554-58 (E.D. Va. 1992); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services, Inc.*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Insurance Co. of North America v. Virgilio*, 574 F.Supp. 48 (S.D. Cal. 1983); *Arkwright-*

Boston Manufacturers Mutual Ins. Co. v. Bauer Dredging Co., 74 F.R.D. 461, 462 (S.D. Tex. 1977); *Insurance Co. of the State of Pennsylvania v. Amaral*, 44 F.R.D. 45, 47 (S.D. Tex. 1968); *contra, Continental Ins. Co. v. Industry Terminal & Salvage Co.*, 2006 A.M.C. 630 (W.D. Pa. 2005); *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258 (S.D.N.Y. 1999).

This Court's guidance therefore is urgently needed in view of the deep conflict among the courts of appeals and district courts on this important and recurring issue.

II. THE FOURTH CIRCUIT'S RULE IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND THE FEDERAL RULES

A. The Fourth Circuit's Decision Directly Conflicts With This Court's Decision In *Waring v. Clarke*

In *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), this Court held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause.[3] In *Waring*, two

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[3] Now codified at 28 U.S.C. § 1333(1), the saving-to-suitors clause provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

vessels had collided on the Mississippi River. The defendant challenged the admiralty jurisdiction of the federal courts on two grounds, one of which was that the saving-to-suitors clause took away from admiralty jurisdiction cases in which common law courts were competent to give a remedy in a trial by jury. *Id.* at 458.

In rejecting that argument, this Court noted there was nothing in the Constitution from which it could be inferred that suits in admiralty, being civil causes rather than common law causes, were ever to be tried to a jury:

> [T]here is no provision, as the constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the seventh amendment of the constitution, providing that in suits at common law the trial by jury should be preserved.

Id. at 460. The *Waring* Court noted that suits in admiralty were constitutionally distinct from suits at common law, and therefore the mode of trial in admiralty actions cannot be controlled by the Seventh Amendment, which only preserves jury trials in common law cases:

> Now by what rule of interpretation or by what course of reasoning can such a provision [the Seventh Amendment] be converted into an

> inhibition upon the mode of trial of suits [in admiralty] which are not exclusively suits at common law ...?

Id. The Court concluded that the adoption of the Seventh Amendment "was done with reference to suits at common law alone." *Id.* Thus, *Waring* confirmed that the Seventh Amendment did not change the rule that trials in admiralty are strictly non-jury (unless the right to a jury was established by Congress).[4]

The *Waring* Court also rejected the argument that the saving-to-suitors clause provided the defendant a right to a jury trial in an admiralty case:

> In respect to the [saving-to-suitors] clause ... saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court ... .

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[4] Congress specifically provided for jury trials in the Great Lakes Act, codified at 28 U.S.C. § 1873, and the Jones Act, now codified at 46 U.S.C. § 30104.

Id. at 460-61. The saving-to-suitors clause therefore does not enable a defendant to force a trial by jury when the plaintiff has sued in admiralty.

Although the Fourth Circuit below cited *Waring* and correctly stated that "if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving-to-suitors clause does not permit a defendant to trump that designation and demand a jury trial" (App. 12a),[5] it held that, because this case filed in admiralty seeks a declaratory judgment, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), "requires a jury trial in this case, even if no counterclaims had been filed." App. 15a.

In so holding, the Fourth Circuit decision directly conflicts with *Waring*. In a declaratory judgment action filed in admiralty in the Fourth Circuit for which there is also diversity jurisdiction, all that a defendant has to do is to demand a jury trial and, contrary to *Waring*, it will thereby "force the plaintiff into a common law court" (46 U.S. at 461), and the Seventh Amendment will "be converted into an inhibition upon the mode of trial in suits which are not exclusively suits at common law." *Id.* at 460. *Waring* precludes that result.

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[5] The late Judge Widener seemed to feel otherwise, however. During the oral argument Judge Widener said: "The court in the Waring case described almost to a T the proposition that we have here and came [out] on the opposite side. I have yet to see some explanation from someone why the Waring case does not control this case."

B. The Fourth Circuit's Rule Cannot Be Squared With The Federal Rules

The Fourth Circuit's opinion allows a defendant in a declaratory judgment action in admiralty to eviscerate a plaintiff's right to a non-jury trial under Rule 9(h) and Rule 38(e) of the Federal Rules of Civil Procedure, contrary to the intent of those rules and historical admiralty practice and procedures.

For more than two hundred years, this Court has repeatedly recognized that, when a plaintiff files its complaint based on admiralty jurisdiction, jury trials are not available, unless Congress provides otherwise. *See, e.g., United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) (as it was "a cause of Admiralty and Maritime Jurisdiction ... no jury was necessary"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 n.10 (1989) ("Civil causes of action in admiralty, however, are not suits at common law for Seventh Amendment purposes, and thus no constitutional right to a jury trial attaches."). That practice was not changed by the unification in 1966 of the Admiralty Rules with the Rules of Civil Procedure, resulting in Rules 9(h) and 38(e).

That year, pursuant to authority delegated by Congress (28 U.S.C. § 2072), this Court prescribed rules of practice and procedure for the federal courts that resulted in Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure. Rule 9(h) states:

> **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction

> that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Rule 9(h), Federal Rules of Civil Procedure (2005). Rule 38(e) provides:

> **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 38(e), Federal Rules of Civil Procedure (2005). By "these rules," Rule 38(e) is referring to Rule 38(a)-(d); Rule 38(a) provides:

> **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 38(a), Federal Rules of Civil Procedure.

The Advisory Committee's Notes to Rule 9(h) inform the analysis of the intent of this rule as to "historically maritime procedures":

> Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. ...

> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. ... The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear. ...
>
> [T]he preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

Rule 9, Federal Rules of Civil Procedure, Advisory Committee Note – 1966 Amendment. 39 F.R.D. 69, 75-76 (1966).

The rules proposed by the Advisory Committee, including Rules 9(h) and 38(e), were approved by this Court without alteration.[6] Rules 9(h) and 38(e) were prepared and approved by this Court, pursuant to the Court's delegated authority to adopt procedural rules that do not "abridge, enlarge or modify any substantive

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[6] *Order of February 28, 1966*, 86 S.Ct. 173, 39 F.R.D. 213 (1966).

right." 28 U.S.C. § 2072. Thus, the adoption of these rules preserved the historical maritime right and practice of trying cases filed on the admiralty "side" of a federal court without a jury. The Fourth Circuit's decision in this declaratory judgment action conflicts with this important and historical admiralty right and practice, and this Court should grant this petition for writ of certiorari, so that it may review that decision.

C. The Fourth Circuit's Reliance On *Beacon Theatres* Is Misplaced

The Fourth Circuit's reliance on *Beacon Theatres* is fundamentally misplaced, as *Beacon Theatres* involves neither the federal court's admiralty jurisdiction nor the plaintiff's election under Rule 9(h) to proceed in admiralty without a jury trial, both of which control whether a defendant has the right to a jury trial in this case.

In *Beacon Theatres*, Fox West Coast Theatres was notified by Beacon Theatres that Fox was operating its theater in violation of the Sherman Antitrust Act by exercising preferential contract rights to show first-run movies to the exclusion of Beacon. To resolve the dispute, Fox filed a declaratory judgment action for a declaration that it was not operating in violation of the antitrust laws and sought injunctive relief against Beacon. Beacon counterclaimed for treble damages and demanded a jury trial. The district court rejected Beacon's jury demand on the ground that the proceeding was equitable in nature, and the Ninth Circuit denied mandamus. This Court granted certiorari and reversed, holding that the Declaratory Judgment Act and applicable Federal Rules of Civil

Procedure were intended to preserve each party's right to a jury trial. 359 U.S. at 504.

Critical to this Court's decision, however, was that any right to jury trial was preserved by the Declaratory Judgment Act and the Federal Rules, citing Rule 38(a) that "the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved ... inviolate." *Id.* at 510. Since the Federal Rules expressly preserved Beacon's Seventh Amendment right to a jury trial, the district court could not preclude a jury trial on the issues in that case.

Here, however, petitioner expressly has invoked the right to a non-jury trial by electing to proceed in admiralty under Rule 9(h), and in that jurisdictional status neither the Seventh Amendment nor any statute provides respondent with a right to a jury trial. The purpose of Rule 38(e) was to make it clear that no new jury rights were created by the unification of the Admiralty Rules with the Federal Rules of Civil Procedure – that the traditional admiralty practice of non-jury trials was preserved. Consequently, the Seventh Amendment does not come into play in this case, and *Beacon Theatres* is simply inapplicable.

The Fourth Circuit below relied heavily on its interpretation of *Beacon Theatres* to the effect that "the Seventh Amendment right to a jury trial must be preserved 'wherever possible.'" App. 14a. But that statement does not apply in the admiralty context, as this Court has confirmed that *Beacon Theatres* did not alter the rule set forth in *Waring*. *See Fitzgerald v.*

United States Lines Co., 374 U.S. 16, 20 (1963) ("the Seventh Amendment does not require jury trials in admiralty cases") (citing *Waring*); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334 (1979) (*Beacon Theatres* "enunciated no more than a general prudential rule"); *Granfinanciera v. Nordberg*, 492 U.S. 33, 55 n.10 (1989) ("Civil causes of action in admiralty, however, are not suits at common law for Seventh Amendment purposes, and thus no constitutional right to a jury trial attaches. *Waring v. Clarke*, 5 How. 441, 460 (1847)").

Moreover, in *Beacon Theatres* this Court stated that its decision was "consistent" with the Declaratory Judgment Act's plan to effect substantial procedural reform "while retaining a distinction between jury and non-jury issues and leaving substantive rights unchanged." 359 U.S. at 508-09. This is consistent with the district court's decision in this case, noting that the majority line of cases does not apply *Beacon Theatres* in the admiralty context:

> [N]early half a century has passed since the Supreme Court handed down *Beacon Theatres*. If *Beacon Theatres* applied to admiralty suits, the Court's silence on this question appears inexplicable, especially in light of the numerous decisions that have held to the contrary.

App. at 38a; *National Casualty Co. v. Lockheed Martin Corp.*, 415 F. Supp.2d 596, 606 (D. Md. 2006).[7]

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[7] *See, e.g.*, *ING Groep, NV v. Stegall*, 2004 A.M.C. 2992, 2995-98 (D. Colo. 2004); *Windsor Mount Joy Ins. Co. v. Johnson*, 264

The mere fact that National Casualty filed a declaratory judgment action to resolve this marine insurance dispute does not deprive it of its right to a non-jury trial by electing to proceed as an admiralty or maritime claim within the meaning of Rule 9(h) and to avail itself of the procedural and substantive rights admiralty practice entails. Thus, *Beacon Theatres* does not strip a plaintiff of its right to a non-jury trial in an admiralty case.

F.Supp.2d 158, 162-64 (D. N.J. 2003); *Jefferson Ins. Co. v. Maine Offshore Boats, Inc.*, 2001 A.M.C. 2171, 2172-74 (D. Me. 2001); *Clarendon Amer. Ins. Co. v. Rodriguez*, 1999 A.M.C. 2885, 2886-87 (D. P.R. 1999); *Underwriters at Lloyds, London v. Sundowner Offshore Services*, 1999 WL 90566, *1 (E.D. La. 1999); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair, Inc.*, 1996 WL 148350, *2 (S.D.N.Y. 1996); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552, 1554-58 (E.D. Va. 1992); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services, Inc.*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Arkwright-Boston Manufacturers Mutual Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D. Tex. 1977); *Insurance Co. of the State of Pennsylvania v. Amaral*, 44 F.R.D. 45, 47 (S.D. Tex. 1968). *See also Norwalk Cove Marina, Inc. v. S/V ODYSSEUS*, 100 F.Supp.2d 113, 114 (D. Conn. 2000) (the contrary approach set forth in *Wilmington Trust v. United States District Court*, 934 F.2d 1026 (9th Cir. 1991) "remains to date a minority position"), *aff'd on other grounds*, 64 Fed. Appx. 319 (2d Cir. 2003) (unpublished opinion).

III. THE PETITION RAISES AN IMPORTANT AND RECURRING ISSUE

A. This Petition Concerns Issues Of National Importance

This Court in 1874 explained the reasons for and the importance of the principle of uniformity of maritime law:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the *rules and limits of maritime law* under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a *commercial character* affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. 558, 575 (1874) (emphasis added); *see also, Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14, 28 (2004) (quoting *The Lottawanna*). Certainly, the important question of the availability of a jury trial in admiralty is the sort of "rule and limit of maritime law" as to which there must be "uniformity and consistency," although the uniformity in this case is derived from Rules 9(h) and 38(e). *See, e.g., La Vengeance, supra*; *Waring, supra*; *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 360

(1962); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). Marine insurance claims have long comprised an important "subject of a commercial character" within admiralty jurisprudence. *See, e.g., De Lovio v. Boit*, 7 Fed. Cas. 418, 444 (Cir. Ct. Mass. 1815) (Story, J.); *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 30-31 (1871); *Sun Mutual Ins. Co. v. Ocean Insurance*, 107 U.S. 485 (1883).

Marine insurers underwrite marine risks in many areas of the United States, and a uniform rule concerning the right to ascertain the existence and scope of coverage in non-jury declaratory judgment cases, as opposed to conflicting rights to non-jury trials among the circuits, would promote the uniformity of maritime law and commerce in the nation. Thus, this Court should review the Fourth Circuit's decision and establish a uniform rule applicable to all federal courts.

B. The Insurer's Right To A Non-Jury Trial In Admiralty Is A Recurring Issue

The declaratory judgment action is a common and well-established method of determining the rights of the parties under an insurance contract. *See, e.g., Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1276 (10th Cir. 1989) (a judicial declaration of coverage "clarifies the parties' legal relations and affords relief from the uncertainty surrounding [the insurer's] obligations"); *Windsor Mount Joy Ins. Co. v. Johnson*, 264 F.Supp.2d 158, 164 (D. N.J. 2003) ("An insurer's action for a judgment

declaring that it need not provide coverage under a policy 'is a normal and orderly procedure.'") (internal citation omitted).

As set forth in Part I, above, numerous courts, both trial and appellate, have issued rulings on the right to a jury trial in a marine insurer's declaratory judgment action. Given the well-established and orderly mechanism in place to ascertain the rights of the parties to an insurance contract and to afford relief from uncertainty, marine insurers will continue to seek declaratory judgments in the federal courts, and the issue whether they are entitled to non-jury trials will continue to recur.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLUTION OF THE CONFLICT

A. Review Of The Fourth Circuit's Writ Of Mandamus Presents The Issue In Its Purest And Simplest Form

In *Beacon Theatres*, this Court granted certiorari to resolve the dispute whether the defendant had a right to a jury trial. That case, like this one, arose when the trial court struck the defendant's jury demand, and that ruling was appealed in a petition for writ of mandamus. Although a writ of mandamus was denied in *Beacon Theatres* and granted by the Fourth Circuit below, the context is identical: whether the defendant had the right to try its case before a jury.

Trial has not yet been scheduled in the district court below. Therefore, certiorari to review the writ of mandamus issued by the Fourth Circuit presents the

ideal opportunity to resolve the conflict among the lower courts on a pure issue of law.

B. There Are No Other Jurisdictional Or Procedural Impediments To This Court's Resolution Of The Issue

In the district court, both parties agreed, and the district court has ruled, that both admiralty and diversity jurisdiction exist, and it is undisputed that National Casualty invoked admiralty jurisdiction and its associated procedures by electing to proceed under Rule 9(h). In addition, trial has not yet occurred or been scheduled, and only the ruling of the Fourth Circuit reversing the district court's order striking Lockheed Martin's jury demand is at issue in this appeal. Because the only issue in this case, with its procedural posture, is whether National Casualty may proceed with its action without a jury, there are no impediments to this Court resolving whether a defendant has the right to impose a jury trial on a plaintiff in a declaratory judgment action in admiralty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1344

[Filed September 27, 2007]

In Re: LOCKHEED MARTIN CORPORATION, Petitioner.	)

On Petition for Writ of Mandamus.
(8:05-cv-01992-AW)

Argued: January 31, 2007

Decided: September 27, 2007

Before TRAXLER and GREGORY, Circuit Judges, and WIDENER,[1] Senior Circuit Judge.

Petition granted by published opinion. Judge Traxler wrote the opinion, in which Judge Gregory joined.

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[1] Judge Widener heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

COUNSEL

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OPINION

TRAXLER, Circuit Judge:

At issue in this case is the right to a jury trial in an admiralty case. Lockheed Martin owns a ship that was damaged at sea, and a dispute over insurance coverage arose between Lockheed and its insurer, National Casualty Company. National filed a declaratory judgment action in district court, designating the action as one proceeding under the court's admiralty jurisdiction and thus without a jury. Lockheed asserted compulsory counterclaims and requested a jury trial. The district court struck Lockheed's request for a jury trial, and Lockheed filed this petition for writ of mandamus, arguing that it has a Seventh Amendment right to a jury trial. We grant the petition, issue the writ, and remand with directions that the district court grant Lockheed's jury demand.

I.

The relevant facts of this case are fairly simple. Lockheed owned a ship that was damaged at sea in June 2001. The ship was insured by National Casualty Company. In April 2005, Lockheed submitted a claim for more than $2,600,000 in damages. Lockheed informed National that it intended to file suit by July

29, 2005, unless National acknowledged that the policy established a six-year statute of limitations.

On July 22, 2005, National preemptively filed a declaratory judgment action seeking a declaration that Lockheed's claims were time-barred under the policy. In accordance with the rules governing admiralty claims, National designated its action as a non-jury admiralty claim. National later amended its complaint, seeking in the alternative a declaration of Lockheed's amount of loss. Lockheed filed an answer and asserted a counterclaim seeking payment for the damage to the ship. Lockheed requested a jury trial on its counterclaim.

Lockheed later filed a motion for judgment on the pleadings. Lockheed asserted that National's first request for declaratory relief (that the claims were untimely) should be dismissed because Lockheed's claim was timely under the policy. Lockheed then argued that the district court should exercise its discretion and dismiss National's second request for declaratory relief (for a determination of the amount of loss), so that Lockheed's counterclaim (which raised the same issue) could be tried by a jury.

The district court concluded that the policy established a six-year limitations period, and the court therefore dismissed National's first request for declaratory relief. The district court, however, concluded that Lockheed did not have a right to a jury trial. The court therefore declined to dismiss National's second request for declaratory relief, and the court struck Lockheed's jury demand. Lockheed then filed this petition for a writ of mandamus,

arguing that the district court's ruling improperly deprived it of its right to a jury trial.

II.

Before considering the merits of Lockheed's claims, we pause to address a threshold issue raised by National. It is well established that mandamus is a drastic remedy that should only be used in extraordinary circumstances and may not be used as a substitute for appeal. *See, e.g., Kerr v. United States Dist. Court,* 426 U.S. 394, 402 (1976); *In re Catawba Indian Tribe of South Carolina,* 973 F.2d 1133, 1136 (4th Cir. 1992). National contends that Lockheed could raise the jury trial issue on appeal from a final judgment, *see First Nat'l Bank of Waukesha v. Warren,* 796 F.2d 999, 1006 (7th Cir. 1986), and that Lockheed's resort to mandamus is therefore improper. We disagree.

In this circuit, a petition for a writ of mandamus is the proper way to challenge the denial of a jury trial. *See General Tire & Rubber Co. v. Watkins,* 331 F.2d 192, 194 (4th Cir. 1964) ("We are inclined to the view that General's petition for Writ of Mandamus is properly before us for consideration since the question presented pertains to a denial of the constitutional right to trial by jury."); *see also Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 511 (1959) ("[T]he right to grant mandamus to require jury trial where it has been improperly denied is settled."). Because Lockheed's petition for a writ of mandamus is a proper vehicle for challenging the district court's decision, we now turn to the merits of Lockheed's claims.

III.

Lockheed contends that it has a Seventh Amendment right to a jury trial of its breach of contract claims asserted against National. Before we consider the specifics of Lockheed's claims, it is helpful to outline the legal framework under which the claims must be analyzed.

A.

The Seventh Amendment preserves the right to a jury trial "[i]n suits at common law." U.S. Const. amend. VII. The Seventh Amendment's guarantee of a jury trial, however, applies only to cases *at law*, a category that does not include *maritime* cases. *See Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847). Thus, in general terms, the Seventh Amendment creates no constitutional right to a jury trial of maritime claims.[2] *See Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963); *see also Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 152-53 (4th Cir. 1995) ("While the Seventh Amendment guarantees a jury trial in cases 'at common law,' no constitutional provision guarantees, or indeed prohibits, jury trials for cases tried in equity or in admiralty.").

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[2] Congress has created a statutory right to jury trial in certain admiralty cases. *See* 28 U.S.C.A. § 1873 (establishing right to jury trial for admiralty tort or contract cases involving certain Great Lakes shipping and coasting trade vessels); 46 U.S.C.A. § 30104(a) (giving injured seamen a right to a jury trial in Jones Act cases).

The role of a jury trial in admiralty cases, however, is complicated by the "saving to suitors" clause of 28 U.S.C.A. § 1333 (West 2006). Section 1333 states that "district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" 28 U.S.C.A. § 1333(1) (emphasis added).

The Supreme Court has explained that the saving-to-suitors clause preserves a plaintiff's right to a common law remedy "in all cases where the common law is competent to give it." *Leon v. Galceran,* 78 U.S. (11 Wall.) 185, 191 (1870) (internal quotation marks omitted). The common law is "competent" in cases proceeding *in personam,* but not those proceeding *in rem*. *See id.*; *Madruga v. Superior Court of California,* 346 U.S. 556, 560-61 (1954). Accordingly, while "federal courts have exclusive jurisdiction over *in rem* actions, federal and state courts have concurrent jurisdiction over *in personam* actions, and the effect of the clause is to give an *in personam* plaintiff the choice of proceeding in an ordinary civil action, rather than bringing a libel in admiralty." *In re: Chimenti,* 79 F.3d 534, 537 (6th Cir. 1996) (citation and internal quotation marks omitted).

The effect of the saving-to-suitors clause as interpreted by the Supreme Court is to give a maritime plaintiff several options when bringing suit:

> First, the claimant may invoke federal admiralty jurisdiction under the grant of original subject matter jurisdiction over

> admiralty, maritime, and prize cases set out in Section 1333. Neither diversity of citizenship nor a minimum amount in controversy need be shown under the statute. On the other hand, most plaintiffs have no right to a trial by jury if they invoke the federal court's general admiralty jurisdiction. Second, by virtue of the "saving clause," plaintiff also may sue at law in a state court or in a United States district court. However, to pursue the latter choice, the requirements of diversity of citizenship and jurisdictional amount must be satisfied.

Id. (quoting 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3672, at 431-33 (1985)); *see also Concordia Co. v. Panek,* 115 F.3d 67, 70 (1st Cir. 1997); *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997).

Perhaps the most important aspect of an admiralty plaintiff's right to proceed "at law" in state or federal court is the right to demand a jury trial. *See Ghotra,* 113 F.3d at 1054 ("The difference between [proceeding in admiralty or at law in state or federal court] is mostly procedural; of greatest significance is that there is no right to jury trial if general admiralty jurisdiction is invoked, while it is preserved for claims based in diversity or brought in state court."). An admiralty plaintiff who chooses to proceed "at law," whether in state or federal court, thus has the right under the saving-to-suitors clause to demand a jury trial.

The procedures for invoking the federal court's admiralty jurisdiction are governed by Rule 9(h) of the

Federal Rules of Civil Procedure. Rule 9(h) provides that:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. . . .

Fed. R. Civ. P. 9(h). In this case, National designated its declaratory judgment action as one proceeding in admiralty.

B.

We turn now to Lockheed's claim that it is entitled to a jury trial. Lockheed argues that because it asserted an *in personam* counterclaim against National, the parties are diverse and the amount-in-controversy requirement is satisfied, it has the right under the saving-to-suitors clause to demand a jury trial on the counterclaim. Lockheed also contends that it has a right to a jury trial under *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), in which the Supreme Court held that the right to a jury trial in a declaratory judgment action depends on whether there would have been a right to a jury trial

had the action proceeded without the declaratory judgment vehicle. *See id.* at 504.

As to Lockheed's counterclaim argument, National contends that Lockheed's counterclaim is not a true counterclaim, but is merely the flip side of National's declaratory judgment claim. National seeks a declaration that there is no coverage and a declaration of the amount owed if there is coverage, and Lockheed asserts in the counterclaim that there is coverage and that the loss amount is more than National will admit. National argues that if this kind of in-name-only counterclaim is enough to require a jury trial in an admiralty case, then the plaintiff's historic right to decide whether to proceed in admiralty will be eviscerated. And even if Lockheed's counterclaim is a true counterclaim, National argues that its Rule 9(h) admiralty designation is controlling and prevents Lockheed from obtaining a jury trial. As to Lockheed's *Beacon Theatres* argument, National contends that *Beacon Theatres* involved common law claims for which there is a Seventh Amendment right to a jury trial and that the Supreme Court's decision in that case was driven by a need to protect the defendant's constitutional right to a jury trial. *See Beacon Theatres,* 359 U.S. at 510-11. This case, by contrast, involves admiralty claims, for which there is no constitutional right to a jury trial. National thus contends that *Beacon Theatres* is simply inapplicable to this case.

At the heart of National's position is its view that the Seventh Amendment is inapplicable to admiralty claims. While it is correct that the Seventh Amendment does not create a right to a jury trial on

maritime claims, we believe that National's position oversimplifies the matter.

As discussed above, the effect of the saving-to-suitors clause is to permit maritime *in personam* claims to be pursued in federal court as maritime (and thus non-jury) claims, in state court as legal claims, or in federal court as legal claims (for which a jury trial is available) if an independent basis for federal court jurisdiction exists. If an admiralty claim is tried "at law," the claim nonetheless remains an admiralty claim, and substantive admiralty law governs the disposition of the claim. *See, e.g., Zych v. Unidentified, Wrecked & Abandoned Vessel,* 941 F.2d 525, 533 n. 12 (7th Cir. 1991) (explaining that the saving-to-suitors clause creates "an area of concurrent jurisdiction for admiralty cases which can be pursued *in personam* in state court. However, federal law must be applied to these state court suits because they remain admiralty cases."). That such claims remain admiralty claims, however, does not mean that the Seventh Amendment is inapplicable.

In *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355 (1962), a longshoreman injured while unloading cargo brought suit against the owners of the ship carrying the cargo. Diversity jurisdiction existed, and the plaintiff designated the action as one at law and demanded a jury trial. The vessel owners impleaded the stevedore for whom the longshoreman worked, arguing that the stevedore was negligent as to the manner in which the vessel was unloaded and that the stevedore should indemnify the vessel owners if they were found liable to the longshoreman. Answering special interrogatories, the

jury found the vessel owners liable but found no fault on the part of the stevedore. On appeal, the circuit court affirmed the jury's verdict against the vessel owners but reversed the judgment in favor of the stevedore, concluding that the stevedore was negligent as a matter of law. *See id.* at 357-58.

The Supreme Court reversed the decision of the circuit court. The Court explained that "[t]he requirements of the Seventh Amendment were brought into play in this case, even though a stevedoring contract is a maritime contract." *Id.* at 359. The Court held that "[t]his suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury," *id.* at 360, and that the manner in which the circuit court rejected the jury verdict violated the Seventh Amendment's prohibition against the re-examination of facts found by a jury.[3] *See id.* at 364.

In our view, *Ellerman* makes it clear that the Seventh Amendment applies to admiralty claims that are tried "at law" by way of the saving-to-suitors clause. *See id.* at 359-60; *see also Vodusek,* 71 F.3d at 152-53 (recognizing that the Seventh Amendment applies to admiralty claim that is cognizable at law); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil,* 704 F.2d 1038, 1041 (8th Cir. 1983) (same). There is an important difference, however, between *Ellerman* and the case at bar. Whereas in *Ellerman* the plaintiff

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[3] *See* U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.").

elected to proceed at law, the plaintiff here elected to proceed in admiralty. We do not believe, at least in this case, that this factual difference is relevant.

Generally speaking, the right to determine whether a claim will proceed as an admiralty claim (without a jury) or as a common law claim (with a jury) belongs strictly to the plaintiff. That is, if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving-to-suitors clause does not permit a defendant to trump that designation and demand a jury trial. *See Waring,* 46 U.S. at 461 ("The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, *which would be the case if he could at his will force the plaintiff into a common law court . . . .* " (emphasis added)); *see also Becker v. Tidewater, Inc.*, 405 F.3d 257, 259 (5th Cir. 2005) (concluding that defendant had no right to a jury trial even though parties were diverse because plaintiff elected to proceed in admiralty). While this principle governs simple proceedings—*e.g.*, proceedings where the defendant does not assert any counterclaims or implead third parties—there is some dispute about its application to more complex cases.

In cases involving counterclaims or cross-claims that could proceed at law, courts are divided on the question of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial. Some courts have concluded that the

plaintiff's Rule 9(h) designation is controlling and that no jury trial is permitted. *See, e.g., Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987 (5th Cir. 1978) (concluding that the plaintiff's Rule 9(h) election prohibited a jury trial of legal claims raised in third-party complaint: "[W]e refuse to permit a third-party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the simple expedient of bringing in a fourth-party defendant."); *Windsor Mount Joy Mut. Ins. Co. v. Johnson*, 264 F. Supp. 2d 158, 162 (D.N.J. 2003) (concluding that plaintiff's Rule 9(h) election to proceed in admiralty jurisdiction could not be "undone . . . through the assertion of a counterclaim that might have been subject to the Court's jurisdiction under Section 1332 and a jury trial if brought in a separate action"); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.*, 90 F.R.D. 313, 317 (E.D.N.Y. 1981) (concluding that a "plaintiff's election to sue on an admiralty or maritime claim as the basis for federal jurisdiction binds the parties in the lawsuit to the inevitable procedural consequence of a court trial, . . . even where a 'legal' counterclaim has been interposed" (citation omitted)).

Other courts, however, have concluded that a plaintiff's Rule 9(h) designation cannot trump the defendant's Seventh Amendment right to a jury trial on a legal counter- or cross-claim. *See, e.g., Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026, 1032 (9th Cir. 1991) (concluding that the plaintiff's "election to proceed in admiralty does not deprive the Union of a jury trial on the Union's properly joined [counter]claims"); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041-42 (8th Cir.

1983) (concluding that intervenor-defendant had the right to a jury trial on its breach of contract counterclaim notwithstanding the fact that the plaintiff elected under Rule 9(h) to proceed on its claims in admiralty); *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258, 261 (S.D.N.Y. 1999) (concluding that defendant asserting compulsory legal counterclaims was entitled to a jury trial even though plaintiff had elected to proceed in admiralty).

In our view, allowing a plaintiff's Rule 9(h) designation to preclude a jury trial on compulsory legal counter- or cross-claims effectively and improperly elevates the traditional mode of trial in admiralty (a bench trial) to a right *not* to proceed before a jury. While the Constitution does not give an admiralty plaintiff the right to a jury trial, it likewise does not give the plaintiff a right to a bench trial. *See Fitzgerald*, 374 U.S. at 20 ("While this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases." (footnotes omitted)); *Vodusek*, 71 F.3d at 152-53. To permit the plaintiff's choice of a customary but not constitutionally required mode of trial to prevent a defendant from taking advantage of his constitutionally guaranteed mode of trial is inconsistent with the Supreme Court's admonition that the Seventh Amendment right to a jury trial must be preserved "wherever possible." *Beacon Theatres*, 359 U.S. at 510.

As noted above, however, National contends that the counterclaims asserted by Lockheed are not true counterclaims. National contends that Lockheed's claims are simply the flip side of National's own claims and add no new issue to the litigation. National argues that permitting a jury trial on the basis of such claims would eviscerate the admiralty plaintiff's traditional right to control the manner in which his claims will be tried. We agree with National that permitting such counterclaims to effectively undo the plaintiff's Rule 9(h) designation would be inconsistent with the historic admiralty practice of giving the plaintiff the power to determine the manner in which his claims would be tried. We need not decide, however, whether the counterclaims asserted by Lockheed are "true" counterclaims, nor need we decide how a defendant's jury demand would be resolved if his counterclaims were not true counterclaims. We need not consider these issues because we agree with Lockheed that *Beacon Theatres* requires a jury trial in this case, even if no counterclaims had been filed.

In *Beacon Theatres,* Beacon notified Fox West Coast Theatres that it believed Fox was violating the Sherman Act. Fox thereafter brought a declaratory judgment action seeking a declaration that its conduct did not violate the Sherman Act. Beacon answered and counterclaimed, seeking treble damages under the Sherman Act and demanding a jury trial. The district court concluded that Fox's declaratory judgment claims were equitable in nature and that a bench trial on the issues raised in Fox's complaint would be held *before* a jury considered Beacon's treble-damages claim. *See id.* at 502-04. The Supreme Court held that the district court erred by viewing Fox's claims as

equitable. The Court explained that the Declaratory Judgment Act,

> while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties. *It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first.* Since the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions.

Id. at 504 (emphasis added; footnote and internal citation omitted).

This case, like *Beacon Theatres,* involves a declaratory judgment action commenced by the party that, but for the existence of the declaratory judgment procedure, would have been the defendant. Although the action sounds in admiralty, that is only because National won the race to the courthouse door and made the Rule 9(h) designation first. *Beacon Theatres,* however, requires us to ignore National's status as the declaratory judgment plaintiff and to instead look to how the action otherwise would have proceeded. Without the declaratory judgment vehicle, Lockheed would have sued National for breach of the insurance

policy, a claim over which admiralty and "law" courts have concurrent jurisdiction. As the plaintiff, Lockheed would have been entitled under the saving-to-suitors clause to designate its claim as a legal one as to which there is a Seventh Amendment right to jury trial.

Contrary to National's contention, we do not believe that *Beacon Theatres* can be distinguished on the ground that it involved legal claims to which the Seventh Amendment applies, while this case involves admiralty claims as to which there is no Seventh Amendment right to a jury trial. Preliminarily, we note that, as explained above, it is an oversimplification to say that the Seventh Amendment does not apply in admiralty. While the Seventh Amendment is not applicable to an admiralty *claim*, it can be applicable to certain claims—those over which the "law" court has concurrent jurisdiction.

Moreover, it is rather circular to contend, as National effectively does, that *Beacon Theatres'* method for determining whether there is a right to a jury trial applies only in cases where there in fact is a right to a jury trial. "Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988); *see also Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 649 (7th Cir. 2002) ("If the declaratory judgment action does not fit into one of the existing equitable patterns but is essentially an inverted law suit-an action brought by one who would have been a defendant at common law—then

the parties have a right to a jury."(internal quotation marks omitted)). There is nothing in *Beacon Theatres* that suggests that this inquiry does not apply when the declaratory judgment action is brought in an admiralty case. The Court's decision in *Beacon Theatres* was driven by the need to protect Seventh Amendment rights. Because the Seventh Amendment is implicated in some admiralty cases (cases where there are claims that may be at law), we believe that the *Beacon Theatres* approach must be applied to such cases. *See, e.g., Wilmington Trust,* 934 F.2d at 1031-32 (applying *Beacon Theatres* to conclude that admiralty cross-claimant was entitled to a jury trial notwithstanding plaintiff's Rule 9(h) designation); *Sphere Drake,* 184 F.R.D. at 261 (same).

At issue in this case is a dispute over whether an insurer is obligated to indemnify its insured for damage sustained by an insured vessel. In the usual course of events—that is, without the declaratory judgment vehicle—Lockheed would have sued National for breach of the insurance contract. And under the saving-to-suitors clause, Lockheed would have been entitled to a jury trial on that claim. Accordingly, under *Beacon Theatres,* Lockheed cannot lose its right to a jury trial simply because National initiated the declaratory judgment action.

IV.

Because Lockheed is entitled to a jury trial, the district court erred by striking Lockheed's jury demand. We therefore grant Lockheed's petition for

the issuance of a writ of mandamus and we direct the district court on remand to try the case before a jury.

PETITION FOR WRIT OF MANDAMUS GRANTED

UNITED STATES COURT OF APPEALS
for the
FOURTH CIRCUIT

No. 06-1344
8:05-cv-01992-AW

[Filed September 27, 2007]

In Re: LOCKHEED MARTIN CORPORATION	)
	)
Petitioner	)
	)

JUDGMENT

Petitioner has filed a petition for a writ of mandamus.

The Court grants the petition

/s/ Patricia S. Connor
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW-05-1992

[Filed February 21, 2006]

NATIONAL CASUALTY COMPANY)
Plaintiff,)
)
v.)
)
LOCKHEED MARTIN CORPORATION,)
Defendant.)

MEMORANDUM OPINION

WILLIAMS, District Judge.

National Casualty Company ("Plaintiff" or "National Casualty") brings this suit for declaratory judgment against Lockheed Martin Corporation ("Defendant" or "Lockheed Martin") to resolve a dispute concerning the scope of coverage of the insurance policy issued by Plaintiff for Defendant's vessel the M/V Sea Slice (the "Policy"). In particular, Plaintiff seeks a declaration from this Court that Defendant's claims for coverage under the insurance

policy are time-barred. In the alternative, Plaintiff asserts that even if these claims are not time-barred, this Court should enter judgment limiting the amount Defendant may recover under the Policy to $718,945 and declare that the Policy does not cover Defendant's administrative expenses and legal fees. Currently pending before the Court are Defendant Lockheed Martin's Motion for Judgment on the Pleadings [4] and National Casualty's Motion to Strike Defendant's Demand for a Jury Trial [6]. The Court has reviewed the entire record, as well as the pleadings with respect to the instant motions and has determined that no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons stated more fully below, the Court will grant in part and deny in part Defendant's Motion for Judgment on the Pleadings and grant Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken in the light most favorable to Plaintiff. Plaintiff provided insurance coverage to Defendant for its vessel the M/V Sea Slice (the "Vessel") under Lockheed Martin's "Primary Marine Fleet Insurance Program."

The Policy contains two provisions regarding limitations on filing suit against National Casualty. Under Clause 5 of the Policy's "General Conditions":

> [t]he Underwriters agree that any action or proceeding against them for the recovery of any claim under or by virtue of this policy shall not

> be barred if commenced within the time prescribed therefore in the statutes of the State of New York.

(The Policy, General Conditions ¶ 5). The Policy sets forth a different statute of limitations in Clause 28, entitled "Suit Against Underwriters," which specifies:

> No action shall lie against Underwriters for the recovery of any loss sustained by the Assured unless such action is brought within one year after entry of any final judgment or decree in any litigation against the Assured, or in the event of a claim without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim, anything in this Policy, any law, ruling or statute of limitation to the contrary notwithstanding.

(The Policy, General Conditions ¶ 28).

Parties do not dispute that the Vessel sustained hull-and-machinery damage during a voyage from Hawaii to Alaska and that the Policy covered at least some of this damage. On July 30, 2001, the fuel in the Vessel became contaminated due to an improperly sealed fuel line cap, which caused seawater to leak into the fuel tank. The next day, the Vessel suffered a series of electrical, mechanical, and structural failures, which resulted in the engine room flooding. The ship's operators decided to curtail the M/V Sea Slice's maiden voyage and arranged to have the ship towed back to Hawaii for repairs on August 1, 2001. While mechanics performed the initial repairs, the Vessel sustained

more damage. It was involved in an allision[1] with another docked vessel on August 4, 2001, and the Vessel collided with its tug on August 15, 2001. The latter occurrence resulted in the engine room flooding yet again.

Defendant submitted an initial claim to Plaintiff for over $2 million for the damage to the Sea Slice. On July 21, 2003, Plaintiff issued a check to Defendant for $666,319, which Plaintiff believed represented the reasonable repair costs less applicable deductibles. Defendant, however, did not agree with Plaintiff's estimates of Defendant's losses and returned the check to Plaintiff uncashed.

Defendant then submitted a revised claim to Plaintiff on April 15, 2005 for $2,631,689. Two months after Defendant submitted the revised claim, Defendant's counsel wrote to Plaintiff to confirm that the statute of limitations under New York law applied to suits concerning the Policy. In response, Plaintiff filed suit in this Court on July 23, 2005, seeking a declaration that the one-year limitations period described in Clause 28, rather than the limitations period detailed in Clause 5 applied to this dispute. Plaintiff's Amended Complaint identifies its claim as a non-jury admiralty claim, pursuant to Rule 9(h) of

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[1] Allision is a term used in maritime law, and Black's Law Dictionary defines an allision as "[t]he sudden impact of a vessel with a stationary object such as an anchored vessel or a pier." Black's Law Dictionary (7th ed. 1999).

the Federal Rules of Civil Procedure.[2] On October 17, 2005, Defendant filed a Motion for Judgment on the Pleadings and its Answer to the Amended Complaint, in which it set forth a counterclaim for breach of contract predicated on this Court's diversity jurisdiction. Defendant made a demand for a jury trial on its counterclaim. On October 31, 2005, Plaintiff filed a response to Defendant's Motion as well as a Motion to Strike Defendant's Demand for a Jury Trial.

ANALYSIS

I. Defendant's Motion for Judgment on the Pleadings

Defendant requests that this Court grant it judgment on the pleadings, pursuant to Rule 12(c). Rule 12(c) provides that after the pleadings are closed, a defendant may present a defense of failure to state a claim upon which relief may be granted by a judgment on the pleadings. *See* Fed. R. Civ. P. 12(c), (h)(2). A motion for judgment on the pleadings is subject to the same standards as a Rule 12(b)(6)

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[2] Rule 9(h) provides that:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Fed. R. Civ. P. 9(h). In turn Rule 38(e) states that: "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of 9(h)."

motion to dismiss. *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002). For such a motion, the court must deny the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In determining whether to dismiss a complaint pursuant to Rule 12(c), this Court must view the well-pleaded material allegations in the light most favorable to the plaintiff and accept the factual allegations contained within the plaintiff's complaint as true. *See Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir. 1997) (*citing Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 217-18 (4th Cir. 1994)); *Chisolm v. TranSouth Finan. Corp.*, 95 F.3d 331, 334 (4th Cir. 1996).

The Court, however, is "not bound to accept as true a legal conclusion couched as a factual allegation." *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) (citing *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981)); *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001) (the mere "presence . . . of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6)"). Nor is the Court "bound to accept [Plaintiff's] conclusory allegations regarding the legal effect of the facts alleged." *United Mine Workers of Am. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085-86 (4th Cir. 1979); *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

Therefore, an action may be dismissed as a matter of law only if the complaint lacks a cognizable legal

theory *or* if it alleges insufficient facts to support a cognizable legal theory. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984) (citing 2A J. Moore, Moore's Federal Practice ¶ 12.08 at 2271 (2d ed. 1982)).

Defendant urges this Court to dismiss National Insurance's Amended Complaint because it argues that the limitations period in Clause 5, not Clause 28, applies to this action. In Clause 5, the parties agree that, in general, suits concerning the Policy must be brought within the limitations period set by New York law, which is six years for breach of contract actions. N.Y. C.P.L.R. § 213(2) (McKinney 2004). On the other hand, Clause 28 carves out an exception to this general rule and provides that certain suits must be brought within one year from the date the cause of action accrues.

To resolve this conflict, the Court must begin by looking to Maryland law.[3] Under Maryland law, insurance policies are interpreted in the same manner as contracts generally; and Maryland law does not adhere to the rule that an insurance policy should be construed most strongly against the insurer. *See*

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[3] When presented with choice-of-law questions, Maryland courts ordinarily follow the rule of *lex loci contractus,* which provides that the construction of a contract be determined by the law of the state where the contract was made. *Commercial Union Ins. v. Porter Hayden Co.*, 698 A.2d 1167, 1199 (Md. 1997); *Allstate Ins. Co. v. Hart,* 611 A.2d 100, 101 (Md. 1992). Parties seem to agree that the contract was made in Maryland, and that, therefore, Maryland law governs the interpretation of the insurance policy's provisions.

Collier v. MD-Individual Practice Ass'n, 607 A.2d 537, 539 (Md. 1992). As with all other contracts, a court must attempt to ascertain and give effect to the intentions of the parties at the time of contracting. *See Levy v. American Mut. Liab. Ins. Co.,* 73 A.2d 892, 894 (Md. 1995). To determine the parties' intent, the court must view the instrument as a whole, attributing to each word its normal or customary meaning, unless some indication exists that the parties intended to use words in a special technical sense. *See Kendall v. Nationwide Ins. Co.,* 702 A.2d 767, 771 (Md. 1996); *Sullins v. Allstate Ins. Co.,* 667 A.2d 617, 619 (Md. 1995); *Nolt v. United States Fidelity & Guar. Co.,* 617 A.2d 578, 584 (Md. 1993); *Collier,* 607 A.2d at 539. While the character of the contract, its object and purposes, and the factual circumstances of the parties at the time of execution may assist in interpreting the meaning of a particular contractual provision, clear and unambiguous language must be enforced as written. *See Dutta v. State Farm Ins. Co.,* 769 A.2d 948, 957 (Md. 2001); *Board of Trustees of State Colleges v. Sherman,* 373 A.2d 626, 629 (Md. 1977) ("where a contract is plain and unambiguous, there is no room for construction").

Plaintiff maintains that the Policy contains some ambiguity, asserting that the conditions of Clause 5 conflict with those of Clause 28. This Court, however, cannot agree. Clause 5 sets the statute of limitations for all actions to enforce the policy and states that: "The Underwriters agree that any action or proceeding against them for the recovery of any claim under or by virtue of this policy shall not be barred if commenced within the time prescribed therefore in the statutes of the State of New York." In contrast, Clause 28

concerns a special subset of these actions and provides that:

> No action shall lie against Underwriters for the recovery of any loss sustained by the Assured unless such action is brought within one year after entry of any final judgment of decree *in any litigation against the Assured,* or in the event of a claim without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim, anything in this Policy, any law, ruling or statute of limitation to the contrary notwithstanding.

(Emphasis added). The structure of this clause indicates that its provisions do not apply to any claim for loss, but only those claims related to "litigation against the Assured," or, in this case, litigation against Defendant. Once this primary condition is met, then Clause 28 operates to bar a suit against Plaintiff brought either one year after the entry of final judgment against Defendant or one year after Defendant settles or pays "such claim." From this language, Clause 28 unambiguously applies to claims that concern injured parties who bring litigation against the parties. The Clause does not apply to all losses that Defendant incurs for one of its insured vessels.

To interpret this provision as applying to all actions would render Clause 5 essentially meaningless. As Plaintiff notes in its opposition, any construction of a contract that makes another provision superfluous is generally disfavored. *See Baltimore Gas & Elec. Co. v.*

Commercial Union Ins. Co., 688 A.2d 496, 503 (Md. 1996) ("A contract must be construed as a whole, and effect given to every clause and phrase, so as not to omit an important part of the agreement.") (citing *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1033 (Md. 1993)); *see also* 11 Richard A. Lord, Williston on Contracts § 32:5 (4th ed. 1992) ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless or inexplicable"). In this case, if the Court were to accept Plaintiff's reading, Clause 5 would become surplusage. According to Plaintiff, any time National Casualty paid or attempted to pay a claim, Defendant would have one year within which to challenge this payment. Yet, Clause 5 explicitly provides "that any action or proceeding against [either party] for the recovery of any claim under the [P]olicy shall not be barred if commenced within the time prescribed therefore in the statutes of the State of New York."

Furthermore, even under Plaintiff's interpretation of Clause 28, it does not follow that Defendant's claim is time-barred. Assuming that "such claim" could refer to a claim by Defendant against Plaintiff for insured losses, Clause 28 still would not apply to this case because Plaintiff did not pay Defendant's claim. Defendant made a claim for more than $2 million, and Plaintiff sent Defendant a check for a portion of that amount. Defendant did not accept this check as payment, nor does this amount represent Defendant's entire "claim." Because the parties did not agree to a settlement and because Plaintiff did not send the sum that Defendant sought, the amount sent to Defendant was not a payment of Defendant's "claim." Therefore,

even if Plaintiff is correct that Clause 28 applies to this type of case, the Court nevertheless finds that Defendant's claim is not time-barred by this clause as a matter of law.

II. Plaintiff's Claim for Declaratory Judgment on the Scope and Amount of Reasonable Costs of Repairs

Plaintiff's Amended Complaint not only seeks a declaration regarding the limitations clauses, but also asserts that a controversy exists with respect to the scope of coverage and the cost of "reasonable" repairs to the Vessel. Defendant's arguments in favor of dismissing the Amended Complaint and those against striking its demand for a jury trial rest on its general assertion that the Amended Complaint merely attempts to deny Defendant's right to try its claim for insured losses before a jury. Yet, these arguments tend to conflate two conceptually distinct issues. A judgment on the pleadings against Plaintiff would preclude this Court or a jury from considering any of Plaintiff's remaining claims, but a judgment on Defendant's request for a jury trial would only determine whether a jury or a court should hear any part of the action. Therefore, this Court will address the threshold question of whether to dismiss the balance of the Amended Complaint before analyzing Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial.

Although this Court has granted judgment in favor of Defendant with respect to Plaintiff's first claim, it remains unpersuaded that the balance of the Amended Complaint should be dismissed in its entirety. Plaintiff has averred that it disputes that the Policy's coverage

extends to some of the repairs that Lockheed performed on the Vessel. Such a dispute clearly qualifies as a case or controversy, and courts have entertained these types of actions, pursuant to their authority under the Declaratory Judgment Act, 28 U.S.C. § 2201. *See, e.g., Certain Underwriters at Lloyd's, London v. Sinkovich,* 232 F.3d 200 (4th Cir. 2000) (reviewing action for declaratory judgment brought by insurer concerning extent of hull insurance coverage); *Home Insurance Co. v. Pan American Grain Mfg. Co.,* 397 F.3d 12 (1st Cir. 2005) (insurer brought declaratory judgment action regarding scope of coverage of marine insurance policy); *Acadia Ins. Co. v. Allied Marine Transport LLC,* 151 F. Supp. 2d 107 (D. Me. 2001) (same).

Defendant has argued that the Supreme Court case of *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) supports its position that this Court should dismiss the remainder of the Amended Complaint. In *Beacon Theatres,* the plaintiff sought declaratory relief against Beacon Theatres under the Sherman Antitrust Act and the Clayton Act. *Id.* at 502. Defendant Beacon Theatres demanded a jury trial of factual issues in the case, which the district court denied, reasoning that the factual disputes in the case were essentially equitable even though the defendant asserted a legal counterclaim. Reversing the Ninth Circuit, the Supreme Court granted Beacon Theatres' request for the issuance of a writ of mandamus, observing that the judge's determination of the common issues in trying the equitable claim, through collateral estoppel, might prevent a jury trial of defendant's counterclaim. *Id.* at 505. The Court held that in those circumstances neither statute nor the federal rules justified the

deprivation of the defendant's right to a jury trial. *Id.* at 508-509. Commentators and courts have cited this case in support of the proposition that a court may not try equitable issues of a case so as to infringe on a party's federal constitutional right to a jury trial. This case, however, does not hold that a court must dismiss an action for declaratory judgment brought pursuant to the district court's admiralty jurisdiction.

Nor does the other Supreme Court decision upon which Defendant relies, *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), have any bearing on the issues in this case. *Wilton* concerned the standard of review for a district court's decision to stay a declaratory judgment action during the pendency of parallel state court proceedings. *Id.* at 279. Since no parallel state court proceedings are pending, this case is inapposite. In sum, as the Amended Complaint sets forth a valid claim, pled with sufficient particularity to meet the requirements of Rule 8 of the Federal Rules of Civil Procedure, the Court will not exercise its discretion to dismiss the entire action.

III. Defendant's Right to A Jury Trial

The final motion before the Court, Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial, raises a question that courts have struggled to resolve since the unification of admiralty and general civil procedure in 1966. When an admiralty plaintiff's right to a non-jury trial in an admiralty suit conflicts with a defendant's desire to have its legal counterclaims tried before a jury, which interest should yield?

In most civil cases, the Seventh Amendment guarantees either party the right to have a jury try issues of fact.[4] The Seventh Amendment, however, does not require a jury trial in a case based on claims in admiralty, and such claims ordinarily are tried to the court. *Fitzgerald v. United States Lines,* 374 U.S. 16, 20 (1963). Where a plaintiff has a cognizable claim under both admiralty and general federal jurisdiction, he may bring the action under the court's general jurisdiction or avail himself of admiralty procedures and remedies by designating his claim as one within the court's admiralty jurisdiction under Rule 9(h).[5] If the plaintiff chooses to proceed under the court's general civil jurisdiction, the right to trial by jury attaches. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 359-60 (1962). Whereas if

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[4] The Seventh Amendment provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII.

[5] The provision referred to as the "Savings to Suitors" clause permits a plaintiff to bring an admiralty suit under the federal court's general jurisdiction where a source of law other than maritime law would afford the plaintiff an alternate remedy. *See* 28 U.S.C. § 1333(1) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled").

the plaintiff invokes Rule 9(h), he has the right to a bench trial.

While some courts have ruled that a plaintiff's decision to proceed under a federal court's admiralty jurisdiction prevents a defendant from seeking a jury trial on its counterclaims, others have held that the defendant has a right to a jury trial notwithstanding plaintiff's election to invoke the court's admiralty jurisdiction. *Compare Windsor Mount Joy Mutual Ins. Co. v. Johnson,* 264 F. Supp. 2d 158, 162 (D.N.J. 2003) (noting that plaintiff's decision to proceed under admiralty jurisdiction cannot be "undone" through the assertion of a counterclaim that is subject to the court's diversity jurisdiction); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair,* 1996 WL 148350, at *2 (S.D.N.Y. April 2, 1996) (same); *Royal Ins. Co. of America v. Hansen,* 125 F.R.D. 5 (D. Mass. 1988) (same); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.,* 90 F.R.D. 313, 317 (E.D.N.Y. 1981) (holding a "plaintiff's election to sue on an admiralty or maritime claim as the basis for federal jurisdiction binds the parties in the lawsuit to the inevitable procedural consequence of a court trial . . . even where a 'legal' counterclaim has been interposed."); *Arkwright Boston Manufacturers Mut. Ins. Co. v. Bauer Dredging Co.,* 74 F.R.D. 461 (S.D. Tex. 1977) (same) *with Wilmington Trust v. United States District Court for the District of Hawaii,* 934 F.2d 1026 (9th Cir. 1991) (ruling that when weighing a defendant's right to have his counterclaim tried before a jury under the Seventh Amendment and plaintiff's right to have a non-jury trial under maritime law, the defendant's Seventh Amendment right is paramount) *cert. denied,* 503 U.S. 966 (1992); *Koch Fuels, Inc. v. Cargo of*

13,000 Barrels of No. 2 Oil, 704 F.2d 1038, 1041 (8th Cir. 1983) (holding that trial court did not abuse its discretion by severing defendant's counterclaim from admiralty action and allowing counterclaim to be tried before a jury); *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258 (S.D.N.Y. 1999) (citing *Wilmington Trust* and ruling that a defendant had the right to have its counterclaim tried by a jury even though plaintiff identified the action as arising under admiralty law); *see also Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978) (concluding that a plaintiff's choice to proceed before the court under Rule 9(h) precluded a third-party defendant from invoking the right to a jury trial of its fourth-party complaint). A minority of jurisdictions have embraced the latter view, with the majority concluding that an admiralty plaintiff's right to a bench trial "trumps" the defendant's right to a jury trial of its counterclaim.

The case of *Windsor Mount Joy Mutual Insurance Company v. Johnson* illustrates the reasoning of the majority of courts confronting this issue. In that case, the plaintiff Windsor Mount Joy Mutual Insurance Company, invoking the admiralty jurisdiction of the court, sought declaratory judgment that it need not provide coverage under its policy with the defendant for the theft of an insured power-boat. *Windsor Mount,* 264 F. Supp. 2d at 159. The defendant answered the plaintiff's complaint and also asserted counterclaims against the plaintiff for breach of contract, indemnification, and breach of covenant of good faith and dealing. *Id.* at 160. The defendant's pleadings also included a demand for a jury trial. *Id.* After reviewing the relevant caselaw and noting the split in authority,

the District Court for the District of New Jersey granted the plaintiff's motion to strike. Although the *Windsor Mount* court observed that the Defendant would be entitled to a jury trial if he had brought an action before the plaintiff and demanded a jury trial, the court found that denial of plaintiff's motion to strike would "emasculate the election given to [the plaintiff] by Rule 9(h)." *Id.* at 163-64 (quoting *Harrison,* 577 F.2d at 987). This Court remains mindful of the consequences of curtailing a party's Seventh Amendment rights. Yet, permitting a defendant to have a jury trial on its counterclaim would vitiate a plaintiff's decision to bring a suit under Rule 9(h). This conclusion is consistent with that expressed by the Advisory Committee in their notes on the 1966 amendments to the Federal Rules of Civil Procedure:

> Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions . . . One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute. It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. . . . Other methods of solving the

> problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

39 F.R.D. 69, 75-76 (1966).

Defendant relies on *Beacon* in support of its assertion that the Seventh Amendment protects its right to a jury trial on its counterclaim. The majority line of cases, decided well after *Beacon Theatres*, does not apply this decision in the admiralty context. *Beacon Theatres* examined the applicability of the Seventh Amendment when a court must decide both equitable and legal issues and held that neither statute nor the federal rules justified infringing on the defendant's Seventh Amendment rights. In an admiralty case, however, the Federal Rules expressly recognize that plaintiffs may elect under Rule 9(h) to have their cases tried before a judge. Furthermore, nearly half a century has passed since the Supreme Court handed down *Beacon Theatres*. If *Beacon Theatres* applied to admiralty suits, the Court's silence on this question appears inexplicable, especially in light of the numerous decisions that have held to the contrary. In these circumstances, this Court cannot adopt the position argued by Defendant that it has a right to a jury trial of its counterclaim.

Moreover, though Defendant's counterclaims can be characterized as compulsory, they concern the same legal issues as Plaintiff's Amended Complaint. Plaintiff seeks a declaration as to the scope of coverage of the Policy, and Defendant's counterclaim alleges that the claims it submitted to Plaintiff are covered by the Policy. That these counterclaims are intertwined with Plaintiffs's action militates in favor of striking Defendant's jury demand. *Cf. Royal Ins. Co.,* 125 F.R.D. at 9. To hold otherwise would enable any defendant to negate a plaintiff's election under 9(h) by asserting a counterclaim that merely represents the "flip-side" of the plaintiff's claim. Both *Wilmington Trust* and *Drake* involved counterclaims that raised issues apart from those pled in the complaints. For this and the reasons previously discussed, this Court will grant Plaintiff's Motion to strike, so as to give meaning to a plaintiff's right to a non-jury trial under Rule 9(h).

CONCLUSION

Therefore, this Court will GRANT *in part* and DENY *in part* Defendant's Motion for Judgment on the Pleadings. The Court will also GRANT Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial. An Order consistent with this Opinion will follow.

Date: February 17, 2006

/s/
Alexander Williams, Jr.
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW-05-1992

[Filed February 21, 2006]

NATIONAL CASUALTY COMPANY Plaintiff,	)
v.	)
LOCKHEED MARTIN CORPORATION, Defendant.	)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, dated February 17, 2006, IT IS this 17th Day of February, 2006, by the United States District Court for the District of Maryland, hereby **ORDERED**:

1. That Defendant Lockheed Martin's Motion for Judgment on the Pleadings [4] BE, and hereby IS, **GRANTED** *in part* and **DENIED** *in part*;

2. That the Amended Complaint, BE and hereby IS, **DISMISSED** in so far as the Amended Complaint alleges that Defendant's claims under the insurance policy are time-barred;

3. That the remaining portion of Defendant's Motion for Judgment on the Pleadings BE, and hereby IS, **DENIED**:

4. That Plaintiff's Motion to Strike Defendant's Demand for a Jury Trial [6] BE, and hereby IS, **GRANTED**; AND

5. That the Clerk of the Court mail a copy of this Order to counsel of record.

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1344
8:05-cv-01992-AW

[Filed October 23, 2007]

In re: LOCKHEED MARTIN CORPORATION, Petitioner.	)

On Petition for Rehearing and Rehearing En Banc

Respondent's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Traxler and Judge Gregory.

For the Court,

/s/ Patricia S. Connor
Clerk